Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term 1998

Graphic Communications
International Union, Local 1B

Petitioner,

v.

Bureau of Engraving, Inc.

Respondent.

Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit decision reversing the District Court and vacating two independent arbitration awards based upon the conclusion that the awards failed to draw their essence from the collective bargaining agreement so far departs from the accepted and usual level of deference to arbitration awards announced in United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) and United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987) as to call for an exercise of this Court's supervisory power.

2. Whether the Eighth Circuit decision reversing the District Court and vacating two independent arbitration awards is in conflict with the decision in Aeronca Inc. v. NLRB, 650 F2d 501 (4th Cir. 1981) which held that a party to a collective bargaining agreement could not claim a contractual benefit through past practice where it sought but gave up an express contractual provision for that benefit in negotiations.

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PETITION FOR WRIT OF CERTIORARI

Graphic Communications International Union, Local 1B (hereinafter "Local 1B") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 164 F.3d 427 and is included in the Appendix at page A1. The Order of the Court of Appeals denying Local 1B's Petition for Rehearing is unreported and included at Appendix page A8. The Order and Memorandum of the District Court ruling in favor of Local 1B is not reported and is included at Appendix page A9. The two arbitration awards at issue are unreported and included at Appendix pages A16 and A26.

JURISDICTION

The decision of the Court of Appeals was entered on January 6, 1999. On March 15, 1999 the Court of Appeals denied Local 1B's Petition for Rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES

Neither the Court of Appeals nor the District Court relied upon statutory interpretation in rendering their decisions.

STATEMENT OF THE CASE

A. Factual Background

The employer and the union have been parties to a series of collective bargaining agreements over the years. The current agreement is effective from April 1, 1995 to March 31, 2000 and will be referred to as the 1995 Agreement. Prior to the 1995 Agreement the parties' last collective bargaining agreement had been effective from April 1, 1991 to March 31, 1995 which will be referred to as the 1991 Agreement.

Over the years and under the series of contracts the parties had experienced ongoing problems with their overtime allocation procedures. The 1991 Agreement called for the "equal distribution of overtime". From the union perspective the "equalization" of overtime concept was a continuing source of grievances due to the employer's apparent indifference to following the contractual requirements. The employer apparently agreed that the existing overtime allocation procedures were generating too many grievances. Thus, coming into negotiations for the 1995 Agreement, both parties agreed that the equalization overtime provision of the 1991 Agreement should be substantially modified.

Early in negotiations on December 7, 1994 Local 1B suggested, "A monetary penalty for being skipped in the overtime rotation", reasoning that a monetary incentive might encourage the employer to accurately apply the equalization procedures. The employer countered by

suggesting that the union assume responsibility for administering overtime opportunities and proposed that neither Local 1B nor itself would pay for overtime violations. This was done in the context of the assumed retention of the existing overtime equalization process. When negotiations based on modifying the existing equalization process stalled, the parties began discussing and ultimately enacted a new straight rotation process for the allocation of overtime, which was a substantial modification of the preexisting "equalization" process. The final agreement incorporated neither the union's earlier suggested language for a monetary remedy for overtime violations, the employer's subsequent proposal for a non-monetary remedy, nor any other expressed remedy.

Following the enactment of the new straight rotation overtime procedure, the two subject grievances arose. Each proceeded to a separate arbitration. In both arbitrations the union contended that the grievant had been wrongly passed over for a specific overtime opportunity under the new procedure and that the appropriate remedy under the new procedure was a monetary award. The employer countered that based upon past practice the appropriate remedy for any overtime violation was a "make-up opportunity". The two arbitrators independently concluded that the grievants had been wrongly denied an overtime opportunity and that the appropriate remedy for the violation under the

new overtime procedure was monetary.[1] Both arbitrators agreed a monetary remedy was most consistent with the new overtime language and that any past practice of non-monetary relief did not survive the termination of the old overtime equalization process.[2] (Award of Jacobs, Appendix pg. A16, A23-24; Award of Lundberg, Appendix pg. A26, A33)

B. Proceedings Below

1. District Court

The employer appealed to the District Court for vacation of the two independent arbitration awards asserting jurisdiction under 29 U.S.C. § 185 and 28 U.S.C. § 1331. The employer contended that the awards of monetary remedies failed to draw their essence from the collective bargaining agreement in light of an alleged past practice of non-monetary relief for overtime violations. The union counterclaimed for confirmation of the awards arguing the monetary awards did draw their essence from the new contractual language concerning the allocation of overtime.

The case was submitted to the District Court on cross motions for summary judgment. The District Court denied the employer's motion for vacation of the awards

[1] On appeal there is no dispute that an overtime violation under the new procedure had occurred. The issue is the appropriate remedy.

[2] Both arbitrations were conducted independently. Neither arbitrator had the benefit of the other's decision or analysis in rendering their separate awards.

and granted the union's motion for confirmation. The District Court noted the standard that a reviewing court may not reconsider the merits of a dispute, and may only set aside an arbitrator's award when that award fails to draw "its essence from the collective bargaining agreement", United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). The District Court went on to elucidate that standard citing the holding of United Paperworkers International Union, AFL-CIO v. Misco, Inc. 484 U.S. 29, 38 that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision". The District Court rejected the employer's contention that the arbitrators' awards failed to draw their essence from the collective bargaining agreement because they were inconsistent with a past practice of non-monetary remedies for overtime violations. The District Court ruled that both arbitrators had specifically (and properly) considered the evidence of past practice but concluded any past practice was not controlling in light of the substantial revision of the parties' overtime allocation procedures.

2. Court of Appeals

The employer then appealed the District Court decision to the Eighth Circuit Court of Appeals. In a decision filed January 6, 1999 the Court of Appeals reversed the District Court holding that the two independent arbitration awards both failed to draw their essence from the collective bargaining agreement. Specifically the

Court of Appeals concluded that the awards failed to draw their essence from the collective bargaining agreement because (1) the 1995 agreement was silent regarding overtime remedies, (2) the awards were inconsistent with the parties' past practice, and (3) the awards directly contravened the employer's clear intent not to be bound by a monetary remedy during negotiations.

The union then filed a Petition for Rehearing. The union contended that both arbitrators had expressly recognized that the 1995 Agreement was silent regarding overtime remedies and had considered conflicting evidence of the parties past practice but concluded that any past practice was not controlling in light of the basic revision to the parties' overtime procedures. As to the to the employer's suggested clear intent not to be bound by a monetary remedy, the union noted that it was in fact undisputed that the employer had proposed an express provision for no monetary relief but withdrawn the same when the parties revised the overtime allocation procedure from an equalization process to a strict rotation basis. By Order dated March 15, 1999 the Court of Appeals denied the union's Petition for Rehearing.

REASONS FOR GRANTING PETITION

QUESTION 1

The Court of Appeals' decision, which reaches the unprecedented result of vacating two independent arbitration awards, so far departs from the standard of deference to arbitration awards as to demand the exercise of this Court's supervisory power. In reaching its decision the Court of Appeals took the inappropriate step of reexamining the facts and reaching its own factual determinations on the parties' negotiations. The Court of Appeals' erroneous factual conclusion that the only remedy proposed in negotiations was Local 1B's proposal for a monetary remedy, which was rejected by the employer, was critical to its decision to vacate the awards. (Appendix page A2). In fact it is undisputed that subsequent to Local 1B's proposal the employer proposed a non-monetary remedy which was ultimately dropped from the employer's proposals and not incorporated into the agreement.

It is well established that a reviewing court may not reconsider the merits of a dispute when requested to vacate an arbitrator's award. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987). In Enterprise Wheel, that this Court articulated the narrow focus of a court's review of an arbitration award:

> [O]ur sole function is to determine if the arbitrator properly considered the contractual arrangement between the parties when making his decision. The only requirement is that the decision 'draw[] its essence from the collective bargaining agreement.' 363 U.S. at 597.

In Paperworkers v. Misco, 484 U.S. at 39, the Supreme Court stated that "as long as the arbitrator is even arguably construing or applying the contract" the award should not be overturned even if "a court is convinced he committed serious error." The District Court properly applied this standard.

Consistent with the instruction of this Court the Eighth Circuit had previously recognized that "[j]udicial review of an arbitrator's award is extremely limited," and any doubts in the mind of the reviewing court "are to be resolved in favor of the validity of the arbitrator's award." Manhattan Coffee Co. v. International Brotherhood of Teamsters, Local No. 688, 743 F.2d 621, 624 (8th Cir. 1984). "Even if a court concludes that the arbitrator has incorrectly interpreted the agreement, it still must uphold the decision." Fairview Southdale Hosp. v. Minnesota Nurses Association, 943 F.2d 809, 811 (8th Cir. 1991).

In this case the Court of Appeals concluded that the arbitrators' awards failed to draw their essence from the collective bargaining agreement for three reasons. First, because the contract was silent regarding a remedy for overtime violations. Second, because the awards were inconsistent with the past practice of offering make-up

opportunities for overtime violations. Third, the awards allegedly ignored the employer's intent not to be bound by a monetary remedy expressed during negotiations. (Appendix pg. A6). The record reveals that the arbitrators were clearly aware of those contentions but based upon the record and chronology of negotiations (including the fact that the employer had itself sought but ultimately dropped language calling for a non-monetary remedy) correctly concluded that a monetary remedy was the appropriate response to any overtime violation which occurred under the newly negotiated overtime policy.

First, both arbitrators recognized that the contract was silent regarding the appropriate remedy for an overtime violation. (Appendix pages A23-24, and A33). However the fact that the parties did not expressly agree to an overtime remedy did not deprive the arbitrators of the authority to resolve the issue in this case. As noted in Elkouri and Elkouri, How Arbitration Works, (5th ed. 1997) at page 654, arbitrators are frequently called on to fill in gaps in a contract where it appears the parties failed to cover all aspects of an issue. The instant case is an example of the parties reaching agreement on a new overtime allocation procedure but failing to agree on a remedy for violations of that procedure.

Second, both arbitrators properly and logically followed general labor arbitration theory which holds that a past practice is legitimized by the underlying conditions on which it is based. Once these conditions are changed, the practice is not necessarily binding any longer.

As noted by Arbitrator Lundberg:

> The parties developed a past practice of making up missed overtime opportunities. However, that past practice developed under contract language that required equalization of overtime opportunities. The change in the contract to language that mandates that overtime be offered in straight rotation is a fundamental departure from the prior contract. The past practice of making up overtime was consistent with equalization of overtime but not with the current language.

(Award of Lundberg, Appendix pg. A33). Arbitrator Jacobs made the same point:

> The former method of resolving missed overtime disputes was valid when the language contained this provision:
>
> ***"...As far as practicable, overtime work shall be distributed equally within all departments..."***
>
> As noted in the April 7, 1995 Company Final Proposal (citation to the arbitration record omitted) this language was to be omitted, and from a reading of the current agreement (citation to the arbitration record omitted) that language cannot be found. In order for a "past practice" to survive a contract termination, the Parties have to agree that the "practice is to be accepted way of doing things in the future, and

> they agree to continue the former practice in the new contract term.
>
> This was the first time since the current contract was put into effect that this type of dispute arose, and from the record, the Parties are not in agreement, that offering nest (sic "next") available overtime as a method to resolve this type of dispute. It is concluded that the former "practice" is not controlling on this dispute.

[Award of Jacobs, Appendix A23-24, bold lettering and italicizing in original]. Thus, both arbitrators expressly concluded that the change in contractual language eliminated the basis for any preexisting make up remedy. In doing so the arbitrators acted consistently with the general view of arbitrators that a past practice does not survive amendment to the underlying contractual language. For example see Thrifty Corp., 85 LA 780, 782-83 (Arb. Gentile 1985); Memphis Light, Gas & Water Div., 69 LA 687, 696 (Arb.. Simon 1977).

The third articulated basis for the Court of Appeal's decision and placing it in the proper chronological position is the key to this petition for writ of certiorari. At one point in negotiations the employer did reject a union effort to secure specific language for a monetary remedy. However it is not true that, "No other remedy, apparently, was proposed..." (Court of Appeal's decision, Appendix page A2). In a subsequent counter-proposal the employer sought an express provision that, "The Union and the

Company assume no responsibility whatsoever for missed overtime opportunities and will not pay for same." Importantly the union rejected this proposal, the Company's final proposal to the union dropped the above-quoted proposal for a non-monetary remedy and the contract enacted contained no provision for a remedy for an overtime violation.

Thus the parties' previous overtime allocation process had been eliminated, a new overtime allocation process had been installed in its place, the remedies proposed by both parties prior to the contractual modification had been dropped and no specific remedy for a violation of the new process had been incorporated into the agreement. Faced with these undisputed facts, both arbitrators, in separate and independent proceedings, reached the same conclusion, i.e. that the appropriate remedy under the new contractual overtime provision was monetary. In fashioning the remedy in these cases both arbitrators were doing precisely what the parties had commissioned them to do, that is interpreting the contract to determine the appropriate remedy under the new overtime provision. Both of the arbitration awards draw their essence from the collective bargaining agreement and are entitled to enforcement.[3]

[3] The Court of Appeals also failed to consider the conclusion of Arbitrator James Lundberg that, "...making up overtime is not consistent with the new requirement that overtime be offered on a straight rotation". (Appendix page A32)

QUESTION 2

In vacating the two arbitration awards the Court of Appeals gave the employer a contractual remedy the employer had sought but gave up in negotiations as a matter of past practice.[4] This is inconsistent with the ruling of the Fourth Circuit in Aeronca Inc. v. NLRB, 650 F.2d 501 (4th Cir. 1981) which ruled that a party who expressly seeks to incorporate a past practice into a contract but then drops that effort cannot rely on the past practice to claim that benefit in the future. In Aeronca the employer had a practice of giving employees a Christmas turkey. During negotiations for a new contract the union made a specific effort to incorporate the "turkey bonus" into the contract but eventually dropped that effort. When the employer subsequently discontinued the "turkey bonus" the union grieved and filed unfair labor practice charges on the issue. Ultimately the case reached the 4th Circuit which ruled against the union noting, "...negotiations leading up to the second (contract) clearly indicate a union abandonment of any attempt to make giving of the turkeys obligatory".

The Aeronca case is consistent with the longstanding labor arbitration standard that if a "past practice" is objected to during negotiations it is incumbent upon its proponent to have the practice written in to the language

[4] Local 1B does dispute a past practice of make-up opportunities as the remedy for overtime violations. However, since both arbitrators had concluded any such past practice did not survive the amendment to the overtime procedures in any event, this was not an issue Local 1B pursued in the Courts below.

if it intends to rely on the practice in the future:

> That inference (that if a practice is not discussed during negotiations the parties' assumption is the practice will be retained) is based largely on the parties' acquiescence in the practice. If either side should, during negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding.

Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, Proceedings of the 14th Annual Meeting of NAA 30, 56-57 (BNA Books, 1961).

The instant case provides an even stronger basis for ruling against a controlling past practice than Aeronca Inc. First, the record clearly reflects an employer effort to expressly bar a monetary remedy in the contract and the ultimate abandonment of that effort. Second, this occurred against the backdrop of the parties substantively altering their previous overtime allocation procedure which, as found by both arbitrators, eliminated the basis for any preexisting practice.

The employer could contend that its decision to drop the non-monetary remedy proposal was made in reliance of an existing practice which would continue even after a new system was put in place. However that explanation is belied by the very fact that the employer determined it necessary to propose a non-monetary remedy in the first instance. The employer's December 15 proposal for a non-monetary remedy made during the development of a new overtime allocation system recognized that the employer could not, and did not, rely on past practice as dictating the remedy after the underlying contractual language was changed from the equalization process to the straight rotation basis. The union contends more logically the employer concluded that the simplified new procedure would be easily administered and thus violations would not occur. Therefore the employer was willing to drop its demand for a non-monetary remedy assuming there would limited risk of a violation or need to apply any remedy. Under either alternative the employer should not now be permitted to claim a remedy through past practice where it sought but dropped that very remedy during negotiations. Aeronca Inc., supra.

IV. CONCLUSION

Local 1B submits that the Court of Appeals decision, which reaches the unprecedented result of vacating two independent arbitration awards, so far departs from the standard of deference to arbitration awards as to demand the exercise of this Court's supervisory power. Further the Court of Appeals decision is inconsistent with the ruling of the Fourth Circuit in Aeronca Inc. v. NLRB, 650 F.2d 501 (4th Cir. 1981) that a party who expressly seeks to incorporate a past practice into a contract but then drops that effort cannot rely on the past practice to claim that benefit in the future. For the foregoing reasons Local 1B requests that this petition for writ of certiorari be granted.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 98-1354

Bureau of Engraving, Inc.,	*	
	*	
Appellant,	*	
	*	Appeal from the United
v.	*	States District Court for
	*	the District of Minnesota.
Graphic Communications	*	
Union, Local 1B,	*	
	*	
Appellee.	*	

Submitted: November 19, 1998
Filed: January 6, 1999

Before BEAM, MAGILL, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MAGILL, Circuit Judge.

The Bureau of Engraving, Inc. appeals from the district court's denial of its motion to vacate two labor arbitration awards that provided two employees monetary damages for missed overtime opportunities. The Bureau contends that these awards failed to draw their essence from the collective bargaining agreement. We agree and, thus, reverse.

I.

The Bureau of Engraving, Inc. (Bureau) and the Graphic Communications International Union, Local 1B (Union) have been parties to several collective bargaining agreements that have regulated the distribution of overtime opportunities to Bureau employees. Between April 1988 and March 1995, the applicable agreements mandated that overtime opportunities be allocated under a system of equalization. Under this system, if the Bureau improperly overlooked an employee for overtime, it would simply offer him or her the next available overtime opportunity--the so called "make-up" remedy.

When the parties negotiated their current collective bargaining agreement (CBA),[1] they agreed to eliminate the equalization system of overtime distribution because it caused too many complaints. In its place, the parties agreed to a straight rotation system of overtime distribution. Under this system, the first eligible employee on the overtime list receives the next available overtime opportunity. If that employee declines the opportunity or is not available, the Bureau offers the overtime to the next employee on the list.

Although the CBA modifies the method for allocating overtime, it does not set forth any specific remedy for failure to follow that allocation scheme. While negotiating the current CBA, the Union proposed a monetary remedy for breach of the overtime provisions. The Bureau, however, rejected this remedy. See Plocker Arb. Award at 3, reprinted in J.A. at 109. No other remedy, apparently, was proposed, and the CBA contains no provision governing remedies for breach of the overtime provisions.

[1] The current CBA is effective from April 1, 1995 through March 31, 2000.

In 1995 and 1996, the Bureau breached the CBA by skipping two employees when it was their turn in the overtime rotation.[2] Both employees filed grievances seeking monetary awards for the Bureau's breaches. The Union sought arbitration of both disputes before separate arbitrators.[3] In both arbitrations, the Union argued that the arbitrators should impose a monetary remedy for breach of the overtime provisions because the Bureau's prior practice of offering a make-up opportunity was inconsistent with the new straight rotation system. The Union argued that the make-up remedy might not make the employees whole because the next opportunity might not be for the same number of hours or pay, the next opportunity might not arise for a long period of time, the employee might be "up" in the rotation when the make-up opportunity arises, and the employee might not be able to work during the make-up opportunity. In contrast, the Bureau argued that the CBA did not allow for a monetary remedy and, in any event, that the make-up remedy was consistent with the parties' past practices and did not disrupt the straight rotation system. Both arbitrators independently concluded that a make-up remedy was not appropriate and ordered the Bureau to remedy its breaches with monetary damages.[4]

---

[2] In this appeal, the Bureau does not dispute the finding that it breached the CBA.

[3] The arbitration provision of the CBA provides:
All disputes and grievances arising over the interpretation of, or adherence to, the terms and provisions of the Collective Bargaining Agreement, including any questions of the arbitrability of any dispute or grievance, shall be subject to resolution by the procedure set forth in the Grievance and Arbitration language of Section 3.
Collective Bargaining Agreement § 3(a), at 2, reprinted in J.A. at 12.

[4] The arbitrators awarded the grievants compensation for a total of 12.5 hours of missed overtime at the Sunday double-time rate.

The Bureau filed a motion to vacate the awards in the district court, arguing that they failed to draw their essence from the CBA. The Union filed a cross-motion to confirm the awards. The district court granted summary judgment to the Union and entered judgment confirming the awards. The Bureau appeals from this judgment.

II.

The Bureau argues that we must reverse the district court's judgment enforcing the arbitrators' awards because they failed to draw their essence from the parties' CBA. We agree.

"The district court's denial of a motion to vacate an arbitration award is not entitled to any special deference on appeal, and this Court reviews its conclusions of law de novo." Homestake Mining Co. v. United Steelworkers, Local 7044, 153 F.3d 678, 680 (8th Cir. 1998). In contrast, our review of an arbitrator's award is deferential. "As long as the arbitrator's award 'draws its essence from the collective bargaining agreement,' and is not merely 'his own brand of industrial justice,' the award is legitimate." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987) (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)). Although we may not vacate an award if the arbitrator was arguably construing or applying the CBA, see Misco, 484 U.S. at 38, we may reverse an award that either fails to draw its essence from the CBA or is contrary to the plain language of the agreement. See Keebler Co. v. Milk Drivers & Dairy Employees Union, Local No. 471, 80 F.3d 284, 287 (8th Cir. 1996) (citing Iowa Mold Tooling Co. v. Teamsters Local Union No. 828, 16 F.3d 311, 312 (8th Cir. 1994)).

We believe that the awards failed to draw their essence from the CBA. The essence of the CBA is derived

not only from its express provisions, but also from the industrial common law. See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960). The industrial common law includes the past practices of the industry and the shop, see id., as well as the parties' negotiating history and other extrinsic evidence of their intent. See International Woodworkers v. Weyerhaeuser Co., 7 F.3d 133, 136-37 (8th cir. 1993); Fairview Southdale Hosp. v. Minnesota Nurses Ass'n, 943 F.2d 809, 811-12 (8th cir. 1991).

It is undisputed that the CBA is silent regarding remedies for breach of the overtime provisions. If an arbitrator attempts to interpret a written agreement that is silent or ambiguous without considering the parties' intent, his award will fail to draw its essence from the CBA. See Weyerhaeuser, 7 F.3d at 136-37, see also CSX Transp., Inc. v. United Transp. Union, 29 F.3d 931, 936 (4th Cir. 1994) ("In construing any contract, including a collective bargaining agreement, determining the intent of the parties is the essential inquiry"; if the written agreement is silent, the arbitrator may consider past practices and bargaining history to fill gaps). Accordingly, we must "consider whether it is at all plausible to suppose that the remedy [the arbitrators] devised was within the contemplation of the parties and hence implicitly authorized by the agreement." Independent Employees' Union of Hillshire Farm Co. v. Hillshire Farm Co., 826 F.2d 530, 533 (7th Cir. 1987) (quotations omitted).

Here, the industrial common law and evidence of the parties' intent militates our conclusion that the awards failed to draw their essence from the CBA. Prior to April 1, 1995, the Bureau offered a make-up remedy when it breached the overtime provisions. Thus, a monetary award cannot find support in the parties' past practices. More importantly, the parties' collective

bargaining history clearly shows that a monetary remedy was contemplated and excluded from the CBA. The Bureau presented uncontroverted evidence that the Union proposed a monetary remedy for breach of the overtime provisions and that the Bureau explicitly rejected that proposal. Because this evidence shows that the Bureau did not anticipate a monetary award for breach of the overtime provisions, we conclude that the awards were not within the contemplation of the parties and, therefore, not implicitly authorized by the CBA. See Phoenix Newspapers, Inc. v. Phoenix Mailers Union Local 752, 989 F.2d 1077, 1082 (9th Cir. 1993) (vacating arbitrator's award when employer rejected same remedy in prior collective bargaining agreement negotiations). In sum, the arbitrators' awards failed to draw their essence from the CBA because (1) the CBA was silent regarding remedies, (2) the awards were inconsistent with the parties' past practices, and (3) the awards directly contravene the Bureau's clear intent not to be bound by a monetary remedy during CBA negotiations. The awards here were not derived from an interpretation of the CBA. Rather, the arbitrators were dispensing their own brand of industrial justice. See Enterprise Wheel, 363 U.S. at 597 ("The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.").

The Union cites Daniel Const. Co. v. International Union of Operating Engineers, Local 513, 738 F.2d 296, 300 (8th Cir. 1984), for the proposition that an arbitrator may craft an award not specifically provided for in a collective bargaining agreement. While this may be true, the arbitrators here have crafted a remedy specifically excluded from the CBA and in direct contravention with the parties' past practices and intent. We, therefore,

conclude that Daniel does not require a different result in this case.

III.

We conclude that the arbitrators' awards failed to draw their essence from the CBA. The CBA was silent regarding the appropriate remedy for breach of the overtime provisions, but the arbitrators' imposed awards that were inconsistent with the parties' past practices and their intent as evidenced by their CBA negotiations. Accordingly, we reverse the district court's order and remand with instructions to vacate the awards.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 98-1354MNST

Bureau of Engraving, Inc.,	*	
	*	
Appellant,	*	
	*	Appeal from the United
vs.	*	States District Court for
	*	the District of Minnesota
Graphic Communications	*	
International Union,	*	
Local 1B,	*	
	*	
Appellee.	*	

The petition for rehearing filed by the appellee has been considered by the court and is denied.

March 15, 1999

Order Entered at the Direction of the Court:

s/s Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Bureau of Engraving, Inc., Civil File No. 3-96-1143

Plaintiff,

v. **MEMORANDUM AND ORDER**

Graphic Communications International
Union Local 1B,

Defendant.

This matter is before the Court upon Plaintiff's motion for summary judgment to vacate two independently-decided arbitration awards and Defendant's cross-motion to confirm both awards. For the following reasons, the Court denies Plaintiff's motion and grants Defendant's motion.

BACKGROUND

Plaintiff Bureau of Engraving, Inc. ("Bureau") employs approximately 375 persons represented by Defendant Graphic Communications International Union Local 1B ("Union"). The parties have previously agreed to a series of collective bargaining agreements ("CBA" or "Agreement"). Each successive CBA governed the legal relationship between the parties and their respective rights and remedies for a specified period of time. The parties entered into the most recent CBA effective April 1, 1995, binding the parties through March 31, 2000. The Agreement contains provisions governing overtime opportunities for Bureau employees and overtime wage rates.

Two Bureau employees, Cheryl Anderson and Shirley Plocker, each filed separate grievances alleging a missed overtime work opportunity, and each requested monetary payment for the time missed. Both grievances were timely filed, and formal arbitration was timely requested, all in accordance with applicable requirements set forth in the Agreement. Arbitrator George Jacobs heard the Anderson grievance. Arbitrator James A. Lundberg heard the Plocker grievance. The parties agreed that the matters were properly before the arbitrators.

Both arbitrators independently came to similar conclusions after recognizing that the present CBA was silent as to the remedy for missed overtime opportunities. Arbitrator Jacobs concluded that Anderson had been entitled to, and missed, an overtime opportunity to work five hours at the designated Sunday overtime wage. Arbitrator Jacobs further concluded that the appropriate remedy would be a monetary payment by Bureau to Anderson for the five hours missed.

A similar result occurred in the Plocker arbitration. There, Arbitrator Lundberg needed only to decide on the appropriate remedy since the parties had stipulated to Plocker's missed overtime opportunity to work seven and one half hours. Arbitrator Lundberg concluded that the Bureau should pay Plocker wages for the hours of the missed overtime opportunity.

Bureau appealed both arbitration awards, arguing that the arbitrators exceeded their authority by granting monetary damages for missed overtime opportunities. The Union filed a cross-motion to have both awards confirmed, arguing that each arbitrator decided the independent grievances within the scope of his authority.

DISCUSSION

This Court's decisions on these motions rests on the well-established rule that judicial review of an arbitrator's award must be extremely limited. See Manhattan Coffee Co. v. International Bhd. of Teamsters, Local No. 688, 743 F.2d 621, 623 (8th Cir. 1984) (citing Nolde Bros. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243,254 (1977); United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960); Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters & Butcher Workmen, 627 F.2d 853, 856 (8th Cir. 1980); Chauffeurs, Teamsters & Helpers Local No. 878 v. Coca-Cola Bottling Co., 613 F.2d 716, 717 (8th cir. 1980)). The United States Supreme Court has long ruled that a reviewing court may not reconsider the merits of a dispute, and may only set aside an arbitrator's award when that award fails to draw "its essence from the collective bargaining agreement." See Enterprise Wheel, 363 U.S. at 597; see also United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987). Furthermore, any doubts arising in the mind of the reviewing court "are to be resolved in favor of the validity of the arbitrator's award." See Manhattan Coffee Co., 743 F.2d at 624.

Unfortunately, the Supreme Court's pronouncement-that an arbitration award "draw its essence from" the CBA-was a murky standard. As such, the burden of interpreting and applying this requirement in the numerous arbitration appeals that followed fell on the shoulders of the Circuit Courts of Appeals. See e.g., Manhattan Coffee Co., 743 F.2d at 623-24; Super Tire Eng'g Co. v. Teamsters Local Union No. 676, 721 F.2d 121, 122-24 (3d Cir. 1983); Loveless v. Eastern Air Lines, Inc., 681 F.2d 1272, 1276 (11th Cir. 1982); F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781, 629 F.2d 1204, 1214-16 (7th Cir. 1980). Recently, the Supreme Court has offered further

enlightenment on this subject, though not directly elucidating the "draws its essence" standard. See Misco, Inc., 484 U.S. at 38 (stating "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision").

In this case, the problem facing both arbitrators was that the Agreement was silent as to the remedy for missed overtime opportunities. When presented with such a dilemma, arbitrators may consider extrinsic evidence to ascertain the parties' intent, especially any applicable past practices. See Keebler Co. v. Milk Drivers & Dairy Employees Union, Local No. 471, 80 F.3d 284, 288 (8th Cir. 1996); Iowa Beef Processors, Inc., 627 F.2d at 857.

Bureau presented evidence at both arbitration hearings establishing that, with a few exceptions several years earlier, past practice for the parties entailed providing the next available overtime opportunity within an applicable department to an employee who had missed a previous opportunity. Bureau argues before this Court that both arbitrators failed to draw the essence of their awards from the contract when they declined to follow past practice, i.e., awarding the next available overtime opportunity to each grievant within their respective departments. Bureau argues that, without reliance on explicit contract language or past practice, each arbitrator merely "dispens[ed] his own brand of industrial justice." Trailways Lines, Inc., v. Trailways, Inc. Joint Council, 807 F.2d 1416, 1423 (8th Cir. 1986).

Considering the facts in this case, however, Bureau's argument fails. Both arbitrators specifically (and properly) considered the evidence of past practice, and each arbitrator concluded that such past practice did not control the grievance before him. Each arbitrator

noted that such past practice had taken place under previous CBAs, but never under the current Agreement. Furthermore, the current Agreement had altered the language used to describe the system for allocating overtime opportunities to Union-member employees, and each arbitrator determined that the Agreement's new allocation system was not consistent with the former past-practice remedy. Nowhere in the Agreement did the parties forbid granting a monetary-damages remedy for missed overtime opportunities; in fact, the Agreement specifically allows monetary damages generally.

Finally, Bureau does not persuade this Court that the arbitrators engaged in a Trailways-like dispensing of "industrial justice." Far from the situation in this case, the Trailways court condemned an arbitrator who did not address the issue submitted by the parties, copied a portion of his opinion from his decision in a different case, and incorrectly declined to apply a prior arbitration award. See Trailways, 807 F.2d at 1422-23, 1425. Consequently, the Court finds Trailways inapposite to the action at bar.

The Court is convinced that the arbitrators' considerations and conclusions in this case were sufficiently informed by contract interpretation and application. Without the benefit of explicit contractual language to guide them, the arbitrators interpreted and applied the Agreement's provisions indirectly and rejected the applicability of past practice. Instead, they each fashioned a remedy best supported by their individual constructions of the Agreement.

The Court does not, as it should not, consider or comment on whether it agrees with the arbitrators' decisions. "Submitting a dispute to arbitration carries with it the risk that the arbitrator will render a different decision that a court might have reached." Daniel Constr.

Co. v. International Union of Operating Eng'rs. Local 513, 738 F.2d 296, 299 (8th Cir. 1984). "It was, after all, the arbitrator[s'] judgment[s] and interpretation[s] for which the parties bargained when they agreed that disputes arising under the contract would be submitted to arbitration." United Elec., Radio & Mach. Workers v. Litton Microwave Cooking Prods., 728 F.2d 970, 972 (8th Cir. 1984) (en banc). This Court will not overturn the arbitrators' decisions on the merits under the guise of questioning whether they truly draw their essence from the Agreement.

CONCLUSION

The Court finds that Plaintiff has failed to provide the Court with a valid basis for vacating the arbitration awards in this case. There is a decided national policy favoring private settlement of labor disputes without judicial interference. Ultimately, this Court concludes that each arbitrator was construing and applying the Agreement, and each award drew its essence from the Agreement. Thus, each arbitrator was acting within the scope of his authority. Therefore, the Court denies Plaintiff's Motion for Summary Judgment and grants Defendant's Motion to Confirm Arbitration Awards.

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. Plaintiff Bureau of Engraving, Inc.'s Motion for Summary Judgment (Clerk Doc. No. 7) is Denied; and

2. Defendant Graphic Communications International Union Local 1B's Motion to Confirm Arbitration Awards (Clerk Doc. No. 12) is GRANTED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 19, 1997

s/s
Paul A. Magnuson
United States District Court Judge

IN THE MATTER OF ARBITRATION
OPINION AND AWARD

Bureau of Engraving, Inc.
Minneapolis, Minnesota

Overtime-C.Anderson
and FMCS #96-04047

Graphic Communications International Union
Local Union #1 B October 28, 1996

APPEARANCES

For the Company
Mr. John Nyus; Human Resources Manager
Mr. Thomas Ross; Production Supervisor
Ms. Nancy Erickson; Vice President of Manufacturing
Mr. Earl Leaf; Production Supervisor

For the Grievant and the Union
Ms. Sandra Wood; Electrical Tester
Ms. Judith Clegg; Steward
Ms. Brenda Smith
Mr. Howard Fisk; Vice President Local #1-B
Ms. Joyce Hurley; President Local #1-B

CONTRACTUAL JURISDICTION

Section 3, Grievance and Arbitration, *Joint Exhibit #1,* provides for an appeal to arbitration of unresolved disputes. The Arbitrator was appointed by the representatives of the Parties from an F. M. C. S. Panel. A hearing was convened at 10:00 AM, August 30, 1996 at the Federal Mediation Offices in Minneapolis, Minnesota. The Grievant and Union were represented by GCIU international representative Gerald Cartwright; the Company was represented by Gray, Plant, Mooty, Mooty

& Bennett attorney George R. Wood. Formal hearing procedure was observed. Following receipt of positions contentions and evidence, the Parties filed briefs and the hearing was closed.

PRELIMINARY STATEMENT

The parties are signatories to a Collective Agreement, *JX #1*, which is effective for the period April 1, 1995 to and including March 31, 2000. The exact nature of the Company's business, its method of production, sales, distribution, and corporate structure is not in contention and will only be mentioned where relevant to the Issue or to provide background. It is sufficient to note that Bureau of Engraving, Inc. is a large printing and graphic communications manufacturer of packaging products. The location where the incident occurred and the grievance filed was Minneapolis, Minnesota. The Bureau of Engraving shall be referred to in this award as the **BUREAU** or the **COMPANY** and their exhibits will be identified as *CX* followed by a number (#).

Section 2, Coverage of Contract - Union Security - Check Off, *JX*#1, recognizes Local Union #1B of the Graphic Communications International Union as the bargaining representative for the covered employees. Local #1B, GCIU shall be referred to in this award as the **UNION**, and their exhibits will be identified as *UX* followed by a number #.

Ms. Cheryl Anderson has been employed continuously at Bureau of Engraving, Inc. since 1982 and at the time of this dispute was classified in a position covered by the Collective Bargaining Agreement. As such, she has standing to file a complaint under Section 2, *JX#1*. Ms. Anderson shall be referred to in this Award as the **GRIEVANT**.

There is no arbitrability issue regarding either her standing to file or the Union's right to represent her in this matter. At the outset, the Parties stipulated there were no procedural or substantive arbitrability issues and the Arbitrator has jurisdiction. Subsequently on July 28, 1995, she and Local #1-B, GCIU filed a formal Grievance in protest, *JX#2*:

> *On July 23rd there was Sunday overtime in my department. They worked two five hour shifts. Day shift hours are 6:00 AM to 11:00 AM and second shift hours are 11:00 AM to 4:00 PM. Overtime this Sunday was only offered to two first shift employees. One person worked the first shift hours (6-11) and the other person worked the second shift hours (11-4). I was not asked to work my shift. Settlement desired: Payment for 5 hours are double time rates.*

Former Human Resources Manager P.R. Wilson responded on August 25, 1995 and denied the Grievance and requested remedy, *JX#3*. Local #1-B President Ms. Hurley filed an appeal on September 12, 1995 and suggested that if the Company could not agree with the Union position, that the matter be moved to arbitration, *JX#4*. Mr. Wilson denied grievance in an October 9, 1995 letter, *JX#6*, after which the matter was moved to arbitration. (Ms. Anderson also filed a September 13, 1995 Grievance, over the same type of issue, *JX#5*, however, the Union withdrew that complaint and it is not before arbitration.) The Parties stipulated that there were no substantive or procedural arbitrability issues and the July 23, 1995 Grievance is properly before arbitration.

POSITIONS OF THE PARTIES

It is the UNION'S POSITION that the Company's failure to allow Ms. Anderson to work on July 23, 1995 and its subsequent denying to compensate her for the missed work, are in error. It seeks an Award which affirms that position and orders the Bureau of Engraving to compensate her five hours of pay at double time her rate of pay. Support for that position follows in summary manner:

1. That Ms. Anderson should have been offered to work the "short" second shift hours on Sunday July 23, 1995. The Union contends this has been the practice for second shift overtime for short shifts on Saturdays and Sundays has always been from 11:00 AM to 4:00 PM and/or 12:00 Noon to 6:00 PM. Note testimony of Union witnesses, Anderson, Judith Clegg, Sandy Wood and Brenda Smith.

2. That Ms. Anderson was offered the opportunity to work on Saturday, July 22, 1995 from 12:00 Noon to 6:00 PM, but declined. The Union notes these are similar hours to the disputed 11:00 AM to 4:00 PM which were not offered to her on July 23, 1995. Both days were available due to Wanda Wilson's being on vacation. The Union also argues the July 22, 1995 overtime opportunity was not mandatory and there is no contractual penalty for declining to work overtime.

3. That the Company's remedy for missed overtime is faulty. In the past, the Company claimed that it has offered the next available

overtime to those who were missed and this establishes a "past practice" which should be controlling here. The Union argues that former remedy cannot make the Grievant "whole" because there might not be another Sunday overtime in this department and there may not be any overtime opportunities in the Micro Section department. Note Ms. Anderson's testimony - that this was first Sunday overtime in this department in the 1995 calendar year. See also *UX#4;* and *CX#1* and #19. Additionally, the Grievant is no longer in the Micro Section department and is on the overtime list for the Routing Department. That the past method of resolving missed overtime (by offering the next available opportunity) occurred under the former contract and is no longer valid. See CX#S 2-7. That agreement provided for equalization of overtime; the instant agreement does not provide for this method.

4. That the only remedy for this matter is to order the Company to compensate her for the missed hours. Arbitral authorities have so noted.[3]

5. That an Award ordering the Company to compensate Ms. Anderson would not violate any provisions of the Agreement.

The COMPANY'S POSITION is that the assigning of work for the date in question and the subsequent denial of compensation to Ms. Anderson was appropriate and seeks an Award which affirms that position and denies the Union grievance and requested remedy entirely.

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[3] HOW ARBITRATION WORKS, Elkouri and Elkouri, BNA 4th Ed. (1985) p 536.

Support for the position follows in summary manner.

1. That Ms. Anderson was not entitled to the overtime work on July 23, 1995. The Company contends that the disputed hours were considered "regular shift" hours that should be assigned to a first shift employee not to Ms. Anderson who was on the second shift.

2. That the Company correctly assigned two other first shift employees, both of whom were senior to Ms. Anderson, to work the hours. Ms. Milbrandt and Ms. Mehl were assigned to the Micro Section's first shift and they worked the hours made available by Ms. Wilson's being on vacation.

3. That even assuming that Ms. Anderson were entitled to the disputed hours, which the Company does not concede that she was, the appropriate remedy would be to offer her the next available overtime. The Company asserts this has been the practice for over thirty years. Note testimony of Company witnesses Nyhus, Erickson and Lief all of whom have been with the Bureau for many years and have first hand knowledge of this practice. Additionally, the Company claims that the Union does not dispute that this was the practice. Further the Union could not produce any evidence to support that employees (who had missed overtime opportunities) were paid rather than offered the next available opportunity. See *CX#2-9*, which are answers to various grievance filed by employees who claimed they were denied overtime opportunities. In each they were offered the next available overtime.

4. That the importance of applying a past practice to determine the appropriate remedy for a missed overtime was demonstrated in *Kaiser Aluminum & Chemical Corp.* 54 LA 613 (1970) Bothwell; which the Company contends is parallel to the instant dispute.

5. That the current Agreement, *JX#1*, makes no provision for payment for missed overtime. Further the Union attempted to obtain a modification in the last contract negotiations but were unsuccessful.[4]

6. That the disputed overtime hours (11:00 AM to 4:00 PM) are not considered second shift hours as contended by the Union because these hours were worked on the weekend.

DISCUSSION

Many of the basic facts in this matter are not in dispute. Ms. Anderson's former classification, shift and departmental assignments are part of the record. The record is equally clear that work was available on (Saturday) July 22, and (Sunday) 23, 1995. It is understood that this dispute does not involve Saturday, July 22, 1995 but is mentioned only to show that it was a weekend day. Ms. Anderson was offered the Saturday, July 22, 1995 work, which she declined, but was not offered the Sunday work.

There are two issues to resolve - one is whether she should have been entitled to work the overtime hours on Sunday, July 23, 1995, and if so, should the remedy be that she be offered future available overtime or compensated for the missed work.

[4] Company Exhibit #13, p 2 "*Joyce wants company to pay for missed opportunities for overtime.*"

The company argued that she was not entitled to the Sunday work because it was a weekend, however this argument might have been persuasive if they not offered her a similar assignment on the previous day, July 22, 1995, which also is a weekend day. Additionally, the Company claimed that, even assuming arguendo she was entitled to the Sunday work, and they do not concede she was, then the appropriate remedy would be to offer her the next available overtime in her department. And witnesses cited some thirty plus years of consistent handling of missed overtime disputes in this manner. The testimony of Union and Company witnesses and the grievances which were settled in this manner show that this was indeed the practice, and the one to which the Company relied to support their position. This argument, too, must fail based on the language of agreements - current and former.

At Section 27 (a), PRACTICES, *JX#1*, it states:

> *"Neither party hereto shall be bound by any rules, regulations or oral agreements not covered by this contract, except that the Employer shall be the sole judge of Shop practices not mentioned herein, and the Shop Steward shall recognized as the representative of the Union..."*

The former method of resolving missed overtime disputes was valid when the language in Section 9(e) contained this provision:

> *"...As far as practicable, overtime work shall be distributed equally within all departments..."*

As noted in the April 7, 1995 Company Final Proposal, *JX#7*, at page six, this language was to be omitted, and from a reading of the current agreement, *JX#1*, that language cannot be found. In order for a *"past practice"*

to survive a contract termination, the Parties have to agree that the "*practice*" is to be accepted way of doing things in the future, and they agree to continue the former practice in the new contract term. This was the first time since the current contract was put into effect that this type of dispute arose, and from the record, the Parties are not in agreement, that offering nest available overtime as a method to resolve this type of dispute. It is concluded that the former "*practice*" is not controlling on this dispute. In HOW ARBITRATION WORKS, BNA 3rd. Ed. at p. 500, the authors noted:

> "*...In using the make-up overtime remedy one arbitrator stated that in the absence of specific contract language, a monetary award for violation of overtime rights must be based on a clearly established past practice or upon a showing that the grievant-claimant actually did suffer damages rather than temporary postponement of an overtime work opportunity. In contrast, another arbitrator has declared the only proper remedy for violation of overtime rights is a monetary award:*
>
> *'Offering an employee an opportunity to make up improperly lost hours at a later date is not an adequate remedy. He is entitled to work those hours at the time they are available, to know when he may expect his turn, and not be expected to work at some time more convenient to the employer...'*[5]

The Union argued that Ms. Anderson cannot be made whole by offering her the next available overtime in her department for two reasons. One, the relevant contract language has changed and the former practice is no longer valid. Further offering her future overtime might deprive another employee who was to work those hours. Additionally, she is no longer in the Micro Section

[5] John Deere Dubuque Tractor Works, 35 LA 495, (Larkin 1960)

department and working overtime in her current department might be the subject of a grievance by another employee in the rotation process. See Section 9 (e), *JX#1*. Both of these are valid arguments. Additionally, she might have been entitled to the overtime in any event.

AWARD

For the reasons cited above, the Grievance filed on behalf of Ms. Anderson for the missed overtime on Sunday, July 23, 1995, is sustained the remedy requested is likewise sustained. The Bureau of Engraving, is to compensate her for the hours at the appropriate rate of pay at the time of this incident in 1995.

s/s
George Jacobs, Arbitrator
October 28, 1996

In re the Arbitration between FMCS No. 96-17336-7

Bureau of Engraving,

Company,

and

GRIEVANCE ARBITRATION OPINION AND AWARD

Graphic Communications International Union Local 1B - Twin Cities,

Union,

Grievance of Shirley Plocker.

Pursuant to **Section 3** of the collective bargaining agreement effective April 1, 1995 to March 31, 2000, the parties have brought the above captioned matter to arbitration.

James A. Lundberg was selected as the neutral Arbitrator from a Federal Mediation and Conciliation Service list of Arbitrators.

The grievance is dated January 26, 1996 and arises out a missed overtime opportunity. The parties agree that there are no procedural issues and the matter is properly before the Arbitrator.

A hearing was conducted on September 13, 1996 and briefs submitted on October 25, 1996. The record was closed on October 28, 1996 upon receipt of the briefs.

APPEARANCES:

FOR THE EMPLOYER:	FOR THE UNION:
George R. Wood, Esq. Gray, Plant, Mooty, Mooty & Bennett, P.A. 3400 City Center 33 South Sixth Street Mpls, MN 55402-3796	Patrice Arseneault, Esq. General Counsel GCIU, Local 1B 2223 Central Avenue N.E. Mpls, MN 55418

ISSUE:

What is the appropriate remedy under the current collective bargaining agreement for grievant's missed overtime opportunity on January 21, 1996.

RELEVANT CONTRACT LANGUAGE:

Section 9.(e) Overtime opportunities shall be offered in each department in straight rotation. Non-standard shifts will be accommodated in this policy based on their regular shift assignment. (Regular shift in this clause being the employee's original shift prior to moving to the non-standard shift.) If through the straight rotation process, a non-standard shift employee is up for an overtime opportunity on what is considered to be a "regular shift for said employee", the employee will have this overtime opportunity marked as worked. There shall be three (3) separate lists per department and shift, for the purpose of offering overtime opportunities by straight rotation: Regular overtime, Late Asked overtime and Sunday overtime.

Section 3 (g) ....If an award calls for payment of money, such sum shall be deposited...

BACKGROUND:

The parties to this arbitration have a very long bargaining history. Their current collective bargaining agreement is effective April 1, 1995 to March 31, 2000.

The parties agree that grievant, Shirley Plocker, was "inadvertently" overlooked for an overtime opportunity on January 21, 1996. When the grievant discovered that she has been missed for a Sunday overtime opportunity, she notified her line supervisor. Initially, the line supervisor indicated she would be paid for the overtime. After contacting the Human Resources Department, Ms. Plocker's supervisor informed her that she would not be paid for the missed overtime but she would be allowed to make up overtime at the next available opportunity. Ms. Plocker did not accept the make up offer and grieved the proposed remedy. It is the union position that payment for missed overtime is the appropriate remedy.

The current collective bargaining agreement provides for assignment of overtime by "straight rotation", using three different lists: Regular overtime, Late Asked overtime and Sunday overtime. This grievance is over a missed Sunday overtime opportunity. Sunday overtime is paid at double time.

Earlier collective bargaining agreements required that overtime opportunities be equalized. From 1991 through 1995 there were no instances where the company paid for missed overtime opportunities. All of the witnesses who missed overtime, since 1991, resolved their missed overtime problem by having the employee make up overtime.

While negotiating the most recent collective bargaining agreement, the union proposed a mandatory

monetary penalty for missed overtime. Management rejected the inclusion of a specific monetary penalty in the collective bargaining agreement.

COMPANY POSITION:

The employer's primary focus is on the inequity of having to pay for hours that have not actually been worked by the employee. They reason that a requirement that an employee make up overtime in order to be paid for overtime is fair to both employer and employee because both parties get the benefit of the bargain. The bargain being wages paid for work performed.

The past practices of the parties has been to make up for missed overtime, not pay for missed opportunities. The employer argues that there is no evidence of overtime being paid for any missed opportunity, since 1991. On the other hand, there are numerous instances of employees and management agreeing that missed overtime is to be make up.

During negotiations the employer rejected the proposal that payment be made for missed overtime opportunities. The employer cites **Kaiser Aluminum & Chemical Corp. 54 LA 613 (W. Bothwell, 1970)** where the Arbitrator said:

> It is also convincing to the arbitrator that the Union proposed at the 1968 negotiations a change in the language of the overtime provisions that would have accomplished what the Union now desires, which is money payment for all overtime bypasses...this language was rejected by the company...This again is **significant evidence** as to the intent of the parties. **54 LA at 617** (emphasis added)

The company asks the Arbitrator to consider the rejection at the bargaining table of a monetary remedy for missed overtime, as significant evidence as to the intent of the parties. It is significant evidence of the parties intent not to provide monetary payment for missed overtime opportunities. The union did not negotiate a monetary remedy during bargaining and should not be allowed to gain through arbitration what they were unable to gain at the bargaining table.

The collective bargaining agreement does not provide for a monetary remedy for missed overtime opportunities. Because the contract does not specifically provide for a monetary remedy the Arbitrator should not impose the remedy.

UNION POSITION:

The union has never agreed to make up overtime opportunities. In the past the union has settled instances of missed overtime for payment. Any deviation by the union from it's settlement policy was made because the overtime issues was not clear cut under the terms of the old contract. Because management offered to settle some missed overtime problems with make up opportunities does not mean that there has been a meeting of the minds. The union did not at any time agree that making up overtime was the only available remedy for lost overtime opportunities.

The collective bargaining agreement does not prohibit payment for missed overtime nor does it limit the remedy for missed overtime to a make up opportunity. The contract is silent as to a remedy but the remedy most often used by Arbitrator is a monetary award for missed overtime. **Elkouri and Elkouri, How Arbitration Works, 536 (4th Ed., 1985)**

Make up overtime may not make the employee whole for the following reasons:

1. The next overtime opportunity may not be for the same number of hours as the missed opportunity.

2. The next overtime opportunity may not arise for a long period of time.

3. There may not be another Sunday overtime opportunity until after the contract expires.

4. When the next overtime opportunity arises the grievant may be "up" in rotation order.

5. The entire department may be offered the next overtime opportunity.

6. The grievant could be unable to work when the next opportunity arises.

Making up a missed overtime opportunity does not place the employee on the same position she would have been in had the company not failed to notify her of the overtime opportunity.

OPINION:

The collective bargaining agreement requires overtime to be offered in straight rotation. **Section 9 (e)** directs that overtime opportunities shall be offered in each department in straight rotation. The contractual requirement leaves very little room for interpretation. An overtime opportunity is to be made available when an employees name comes up on rotation. A failure to offer the opportunity to the employee whose name comes up on rotation is a breach of the contract. The parties in this

arbitration recognize the breach but can not agree on the appropriate remedy.

Under the prior contract overtime opportunities needed to be equalized. The practice of making up overtime was consistent with the concept of equalizing overtime.

However, making up overtime is not consistent with the new requirement that overtime be offered on a straight rotation. The contract term is not intended to promote the balancing of overtime. The contract grants to the next individual on the relevant list the right to work the next available overtime. Using the next available overtime opportunity to make up a list overtime opportunity will only serve to further disrupt the rotation.

The union pointed out the following problems with making up an overtime opportunity:

1. The next overtime opportunity may not be for the same number of hours as the missed opportunity.

2. The next overtime opportunity may not arise for a long period of time.

3. There may not be another Sunday overtime opportunity until after the contract expires.

4. When the next overtime opportunity arises the grievant may be "up" in rotation order.

5. The entire department may be offered the next overtime opportunity.

6. The grievant could be unable to work when the next opportunity arises.

All of the consequences identified by the union are likely to arise under the current straight rotation system for offering overtime.

The parties developed a past practice of making up missed overtime opportunities. However, the past practice developed under contract language that required equalization of overtime opportunities. The change in the contract to language that mandates that overtime be offered in straight rotation is a fundamental departure from the prior contract. The past practice of making up overtime was consistent with equalization of overtime but not with the current language.

Arbitrator's have generally found that a monetary award for missed overtime is appropriate.

> Unquestionably the most frequently utilized remedy where an employee's contractual right overtime work has been violated is a monetary award (generally at the overtime rate) for the overtime in question. **Elkouri and Elkouri, How Arbitration Works, BNA 4th Edition, 1985, p. 536.**

When make up overtime was been favored by one Arbitrator, the existence or non existence of special circumstances, justifying a monetary award was considered to be an important factor. **ID. citing Arbitrator Shanker in 76 LA 10, 13-14.** It was Arbitrator Shanker's opinion that make up overtime is the more "equitable remedy."

The equitable argument made by the company is accurate, consistent and compelling. Even in light of the new contractual language, the argument that the company is entitled to receive labor in return for wages can not be ignored. The reality is that neither of the proposed remedies are completely satisfactory.

The arbitrator considers the following factors to weight more heavily in favor of a monetary remedy in this case.

1. The collective bargaining agreement directs that overtime shall be offered in straight rotation. A violation of this mandatory provision of the agreement will be remedied by a monetary payment but might not be remedied by using a make up overtime opportunity.

2. The past practice of making up overtime developed under a contract provision that provided for equalization but the new contract does not address the equalization of overtime.

3. A monetary payment for missed overtime is a simple remedy requiring a minimum amount of administrative effort and the remedy circumvents claims of unfairness that might come from either the party who missed the overtime or claims of unfairness by other employees displaced in the overtime rotation.

4. Other decisions by Arbitrator's have most often resulted in a monetary award.

The collective bargaining agreement at **Section 3 (g)** contemplates the possibility of a monetary award in Arbitration. In this instance a monetary award is appropriate. Testimony indicates that the overtime opportunity that should have been offered to the grievant was for up to seven and one half hours on Sunday.

AWARD

The grievance of Shirley Plocker is hereby upheld. The company shall pay to the grievant seven and one half hours of overtime pay at the Sunday double time rate.

Dated: 11/25/1996 **s/s**
Arbitrator James Lundberg

Supreme Court, U.S.
FILED
JUL 8 1999
OFFICE OF THE CLERK

(2)

No. 98-1995

In the
Supreme Court of the United States
October Term, 1998

Graphic Communications International Union--Local 1B,

Petitioner,

vs.

Bureau of Engraving, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

Neither of the parties has a parent company nor non-wholly owned subsidiary.

QUESTIONS PRESENTED

1. Whether the Eighth Circuit decision reversing the District Court's Order and vacating two arbitration awards on the proper grounds that the awards failed to draw their essence from the collective bargaining agreement so far departs from the applicable standard of review as to call for an exercise of this Court's supervisory power.

2. Whether the Eighth Circuit decision reversing the District Court's Order and vacating two arbitration awards conflicts with the decision in *Aeronca, Inc. v. NLRB*, 650 F.2d 501 (4th Cir. 1981).

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STATEMENT OF THE CASE

This case arises out of two grievances that were based on claims of missed overtime opportunities. The grievances were filed by Petitioner, Graphic Communications International Union--Local 1B, against Bureau of Engraving, Inc. ("Bureau"), which employs many of Petitioner's members. The primary issue raised by the grievances was the proper remedy under the parties' current collective bargaining agreement ("CBA") if an employee is passed over for overtime.

Under the current CBA (which became effective April 1, 1995, and runs until April 1, 2000), overtime at the Bureau is allocated on a straight rotation basis within each department. Prior CBAs called for yearly equalization of overtime between employees in a department.

The current CBA is silent as to any remedy that applies if a person is skipped in the overtime rotation. The parties have a historical past practice (as noted by the arbitrators) of remedying a missed overtime opportunity by awarding the person who was skipped the next available overtime within that person's department.

During negotiations for the current CBA (which took place in late 1994 and early 1995) both Petitioner and the Bureau recognized the need to change the manner in which overtime was allocated. The parties discussed using a straight rotation system of overtime allocation, which would replace the equalization system used previously. As part of those discussions over a new overtime allocation system, Petitioner proposed that the Bureau pay wages to employees who might be skipped in the overtime rotation. This became known as a "monetary remedy" for missed overtime opportunities. The Bureau expressly rejected this proposed remedy. Instead, the Bureau suggested that Petitioner take over all responsibility for implementing overtime policies at the Bureau, a suggestion Petitioner rejected. The Bureau also suggested

that neither it nor Petitioner be responsible for paying a monetary remedy if an employee is skipped in the overtime rotation. Petitioner, in essence, adopted this suggestion in all material respects.

The current CBA calls for arbitration of all grievances not otherwise settled by the parties. The grievances were arbitrated and decided in late 1996. Copies of the arbitrators' awards are found in Petitioner's Appendix.

The artibrators imposed upon the Bureau the obligation to pay money if an employee is skipped in the overtime rotation. In imposing this remedy, the arbitrators ignored the undisputed evidence that use of a monetary remedy had been rejected by both parties during contract negotiations for the current CBA. Instead, the arbitrators relied upon factors outside of the CBA, such as what other arbitrators have done "generally" in remedying missed overtime opportunities. (Appendix, at A33.)

The United States District Court for the District of Minnesota affirmed the arbitrators' awards, but failed to properly address the issue of whether the arbitrators had exceeded the scope of their authority in issuing their particular remedies. On appeal, the United States Court of Appeals for the Eighth Circuit reversed the district court's order and vacated the arbitration awards. The Eighth Circuit properly held that the arbitrators had exceeded their authority under the current CBA by adopting a remedy (*i.e.*, the monetary remedy) that the parties had expressly rejected during contract negotiations. The Eighth Circuit also denied Petitioner's petition for rehearing.

REASONS FOR DENYING THE PETITION

PRELIMINARY STATEMENT

This case does not meet the Supreme Court's standards for granting a petition for writ of certiorari. The Eighth Circuit followed established labor law in issuing its decision, which is consistent with decisions from other federal circuits on the issue of the deference to be given a labor arbitrator's award.

Contrary to Petitioner's claims, the Eighth Circuit did not exceed the proper scope of review when it determined that the arbitration awards should be vacated because they fail to draw their essence from the collective bargaining agreement. The Eighth Circuit did not re-examine the facts found by the arbitrators or reach its own factual determinations. Rather, the Eighth Circuit relied upon the same facts found by the arbitrators, most of which were undisputed.

Petitioner misconstrues the Fourth Circuit's opinion in *Aeronca, Inc. v. NLRB*, 650 F.2d 501 (4th Cir. 1981), which is not applicable to this case. In *Aeronca*, the Fourth Circuit refused to enforce an order of the National Labor Relations Board based upon a union's waiver of the duty to bargain. The *Aeronca* Court did not consider or decide whether an arbitrator's award failed to draw its essence from the parties' collective bargaining agreement. Petitioner also misconstrues the Eighth Circuit's holding in this case.

DISCUSSION

I. This Case Does Not Meet The Standards For Supreme Court Review.

The Eighth Circuit's decision does not meet this Court's standards for granting review. There is no inconsistency between the Eighth Circuit's decision and the decisions of

other circuit courts that requires the Court's intervention or clarification. In fact, the Eighth Circuit's decision is consistent with the decision of the Ninth Circuit Court of Appeals in *Phoenix Newspapers, Inc. v. Phoenix Mailers Union Local 752*, 989 F.2d 1077 (9th Cir. 1993), as well as recent decisions of other circuit courts. *See, e.g., Bruce Hardwood Floors v. UBC, S. Council of Indus. Workers, Local Union No. 2713*, 103 F.3d 449 (5th Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 329 (1997); *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union*, 76 F.3d 606 (4th Cir.), *cert. denied*, 519 U.S. 822 (1996). Petitioner's assertion that the Eighth Circuit's decision is in conflict with the Fourth Circuit's *Aeronca* decision is simply an erroneous interpretation of both *Aeronca* and the Eighth Circuit's holding, as is demonstrated below.

Nor did the Eighth Circuit depart from the accepted and usual course of judicial proceedings. Rather, it followed established precedent on the issue presented to it, the proper standard of review of a labor arbitrator's award.

Rule 10 of the Rules of the Supreme Court of the United States expressly states that petitions are "rarely granted" when the asserted errors are disputed factual findings or the application of a properly stated rule of law. This is precisely the assertion of error Petitioner is making here. Petitioner is simply wrong in its assertion of error regarding the Eighth Circuit's decision. Nonetheless, even if Petitioner's assertion of error was accurate, it is insufficient to justify a grant of this Court's supervisory powers under Rule 10. In essence, Petitioner presents no appropriate reason why this Court should exercise its supervisory powers.

The Court has recently denied petitions for writs of certiorari where the issue was whether the court of appeals had properly applied the standard of review to an arbitrator's award. *See, e.g., Bruce Hardwood Floors*, 103 F.3d 449, *cert. denied*, __ U.S. __, 118 S. Ct. 329 (1997); *Mountaineer Gas Co.*, 76 F.3d 606, *cert. denied*, 519 U.S. 822 (1996). The

present case is no different from *Bruce Hardwood Floors* or *Mountaineer Gas*. No basis exits for granting certiorari in this case.

II. Petitioner Misconstrues The Eighth Circuit's Decision.

A. The Eighth Circuit did not re-examine the facts or reach its own factual determinations.

In reviewing the district court's decision, the Eighth Circuit did not reexamine the merits of the underlying dispute, as Petitioner suggests. Instead, the Eighth Circuit accepted the factual findings made by the arbitrators. Based on those undisputed facts, the Eighth Circuit held that the arbitration awards did not draw their essence from the CBA and should be vacated. Contrary to Petitioner's argument, this holding relied upon the same facts found by the arbitrators.

That the Eighth Circuit did not re-examine the facts or make its own factual determinations is evident from the petition itself. Petitioner discusses three facts on which the Eighth Circuit relied to reach its conclusion that the awards did not draw their essence from the CBA. (*See* Petition, at 8-12.) These three facts, however, were found to exist by both arbitrators. They are not new facts or new factual determinations. Although Petitioner improperly disagrees with the legal conclusions the Eighth Circuit drew from these facts, the facts themselves are not new or even disputed. Moreover, the Eighth Circuit's legal conclusions are well within the bounds of its discretion when reviewing arbitration awards, as is demonstrated below.

B. The Ninth Circuit's decision in *Phoenix Newspapers* supports the Eighth Circuit's decision.

In a closely analogous case, the Ninth Circuit vacated an arbitrator's award as exceeding his authority because the parties' bargaining history indicated they did not agree and never would have agreed to the remedy imposed by the arbitrator. *Phoenix Newspapers*, 989 F.2d at 1082. The dispute in *Phoenix Newspapers* concerned unilateral manning changes by an employer, which the arbitrator remedied by forcing the employer to bargain with the union for a higher wage rate. Noting that the bargaining history of the parties indicated that the employer had vigorously fought the union's attempt to make the former manning practices binding and had rejected several proposals by the union to incorporate manning practices into the collective bargaining agreement, the court considered it "unlikely that the parties would have contemplated that manning changes should automatically be remedied by an increase in the . . . wage rate." *Id.* The court emphasized that the extent of an arbitrator's authority to fashion a remedy is limited to "decid[ing] what the parties would have agreed on had they foreseen the particular item in dispute." *Id.* at 1083 (quoting *Desert Palace, Inc. v. Local Joint Executive Bd.*, 679 F.2d 789, 793 (9th Cir. 1982)). Based on the evidence of the parties' intent from their prior bargaining history, the court held that "the arbitrator's remedy was not 'rationally derived' from the 'general framework or intent' of the Agreement." *Id.* (quoting *Desert Palace*, 679 F.2d at 793).

In this case, during contract negotiations over the current CBA, the Bureau rejected the Union's proposal to incorporate a monetary remedy for missed overtime opportunities into the CBA. Consistent with *Phoenix Newspapers*, the arbitrators' authority here was limited to "decid[ing] what the parties would have agreed on had they foreseen the particular item in

dispute." 989 F.2d at 1083. Here, the undisputed facts show that the parties did foresee that missed overtime opportunities would be the subject of grievances, and the Bureau refused to adopt a monetary remedy for such grievances. In *Phoenix Newspapers*, the court found it "unlikely," given the employer's opposition to making manning practices binding, that the parties would have reached an agreement to remedy manning changes with an increase in wages. *Id.* at 1082. In this case, the monetary remedy imposed by the arbitrators was discussed and explicitly rejected during contract negotiations. Faced with these facts, it is more than "unlikely" that the Bureau would have agreed to a monetary remedy. It is inconceivable. Accordingly, "[t]he arbitrator[s'] remedy was not based on a plausible interpretation of the Agreement, was not within the contemplation of the parties, and was not a fair resolution of the dispute." *Id.* at 1083.

C. The decision in *Aeronca* is inapplicable to this case.

Relying upon *Aeronca, Inc. v. NLRB*, 650 F.2d 501 (4th Cir. 1981), Petitioner asserts that the Eighth Circuit's decision is improper, claiming that it adopts a remedy that the Bureau had abandoned during negotiations, *i.e.*, make-up overtime. Petitioner misconstrues *Aeronca*, which has no applicability to this case.

Aeronca dealt with review of an order issued by the National Labor Relations Board, not an arbitrator's award. 650 F.2d at 501. Indeed, the Fourth Circuit determined that it need not decide whether the Board had abused its discretion in failing to give appropriate deference to the arbitrator's decision. *Id.* at 503. Rather, the Fourth Circuit concluded that the Board's decision was improper based upon labor law precedent having nothing to do with the deference that should be given to arbitrators' awards. *Id.* Petitioner misstates the

Fourth Circuit's holding, attempting to imply that the holding relates to review of a labor arbitrator's award. In fact, the Fourth Circuit denied enforcement of the Board's order because it found that the union had waived the company's duty to bargain over a particular issue. *Id.* at 501. *Aeronca*, therefore, is not applicable to this case, and the Eighth Circuit's decision is not in conflict with it.

Moreover, Petitioner misconstrues the scope of the Eighth Circuit's holding. Contrary to Petitioner's claim, the Eighth Circuit did nothing more than reverse the district court's order and vacate the arbitrator's awards. No specific remedy was imposed upon the parties by the court's holding. (*See* Appendix, at A7.) Thus, *Aeronca* has no application here, since the Eighth Circuit did not impose the remedy Petitioner suggests.

III. The Eighth Circuit Properly Found That The Arbitrator's Decision Did Not Draw Its Essence From The CBA.

While labor arbitration awards generally are subject to a deferential standard of review, an arbitrator's power to issue an award is confined by the intent of the parties. The Eighth Circuit correctly stated established law that "any power that the arbitrator has to resolve [a] dispute must find its source in a real agreement between the parties." *I.S. Joseph Co., Inc. v. Michigan Sugar Co.*, 803 F.2d 396, 399 (8th Cir. 1986). *See also CSX Transp., Inc. v. United Transp. Union*, 29 F.3d 931, 936 (4th Cir. 1994) (explaining that "[i]n construing any contract, including a collective bargaining agreement, determining the intent of the parties is the essential inquiry") (quoting *Loveless v. Eastern Air Lines, Inc.*, 681 F.2d 1272, 1279 (11th Cir. 1982)).

Accordingly, a reviewing court may vacate an arbitration award "when the award does not derive its essence from the collective bargaining agreement." *E.g., Keebler Co. v. Milk*

Drivers and Dairy Employees Union, Local No. 471, 80 F.3d 284, 287 (8th Cir. 1996). An arbitrator must construe the parties contract; the arbitrator cannot amend it or impose new obligations upon the parties. *Alvey, Inc. v. Teamsters Local Union No. 688*, 132 F.3d 1209, 1213 (8th Cir. 1997); *Excel Corp. v. United Food and Commercial Workers*, 102 F.3d 1464, 1467 (8th Cir. 1996); *Keebler Co.*, 80 F.3d at 288. When the arbitrator effectively amends the parties' contract, or imposes new and unbargained-for obligations on the parties, the award does not draw its essence from the collective bargaining agreement, and the arbitrator exceeds his or her authority. *Alvey*, 132 F.3d at 1213; *Excel Corp.*, 102 F.3d at 1467; *Keebler Co.*, 80 F.3d at 288.

As this Court explained in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), an arbitrator's award will not be enforced if it has no rational basis in the collective bargaining agreement:

> [An] arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from other sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

The one thing that may be said with absolute certainty about the proper remedy for missed overtime under the CBA is that the Union and the Bureau did not intend that remedy to be payment of wages. An arbitrator is confined to interpreting and applying the collective bargaining agreement (and the parties' intent thereunder). He is not free to amend the agreement or impose new obligations on the parties.

Enterprise Wheel & Car Corp., 363 U.S. at 597. *See Alvey*, 132 F.3d at 1213; *Excel Corp.*, 102 F.3d at 1468; *Keebler Co.*, 80 F.3d at 288. Determining the intent of the parties remains at all times "the essential inquiry." *See, e.g., CSX Transp., Inc.*, 29 F.3d at 936. Here, both arbitrators recognized the undisputed fact that the Bureau had explicitly rejected a proposal to include a monetary remedy for missed overtime opportunities in the CBA. Indeed, as Petitioner concedes, both parties to the negotiations rejected this as a viable remedy.

By ordering payment of wages for missed overtime opportunities, the arbitrators imposed the very remedy rejected by the parties during contract negotiations. The arbitrators effectively amended the parties' contract, forcing an obligation on the Bureau that it had refused to accept during negotiations. The arbitrators therefore exceeded their authority, and the awards were properly vacated by the Eighth Circuit. *See Alvey*, 132 F.3d at 1213; *Excel Corp.*, 102 F.3d at 1468; *Keebler Co.*, 80 F.3d at 288.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied. Respondent respectfully requests that the Court issue an Order denying the petition.

Dated: July 8, 1999.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term 1998

Graphic Communications
International Union, Local 1B

Petitioner,

v.

Bureau of Engraving, Inc.

Respondent.

Reply Brief in Support of Petition For a Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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DISCUSSION

The employer insists that the Eighth Circuit did not reexamine the facts or reach its own factual determinations in reversing the District Court and the two independent arbitration awards. However from the face of the employer's Brief in Opposition to Petition for Writ of Certiorari it becomes clear that the Eighth Circuit did ignore the record and base its decision on its own erroneous factual assumptions. Specifically the Eighth Circuit concluded that a monetary remedy for overtime violations under the parties newly negotiated overtime policy was improper because such a remedy had been rejected by the employer and "(n)o other remedy, apparently, was proposed..." during negotiations. (Appendix Page A2.) It is factually wrong to suggest that the only remedy discussed in negotiations for overtime violations was a monetary payment. Even the employer acknowledges that in negotiations:

> The Bureau also suggested that neither it nor (the Union) be responsible for paying a monetary remedy if an employee is skipped in overtime rotation. (Employer's Brief page 1-2).[1]

[1] There is no basis whatsoever for the employer's statement that the Union "in essence, adopted this suggestion in all material respects." (Employer Brief page 2.) The Union never agreed that there would be no monetary remedy for overtime violations, neither arbitrator remotely suggested that this was the case and there is no dispute that the employer dropped its written proposal for non-monetary relief during negotiations.

This "suggestion" was in the form of a specific written proposal for language the employer expressly sought to include in the parties' collective bargaining agreement.[2] The language which the employer sought is as follows:

> The Union and the Company assume no responsibility whatsoever for missed overtime opportunities and will not pay for such.

The record demonstrates that after the employer proposed this language, Local 1B rejected its inclusion in the contract and the employer dropped that language from its subsequent written proposals. This language expressly sought by the employer was not included in the contract. Both arbitrators were aware of this fact which clearly was a key to their respective determinations that any alleged past practice of non-payment for overtime violations did not survive the amendment to the overtime allocation procedures.

In reaching its decision the Eighth Circuit also ignored the key factual determination of both arbitrators that in the negotiations the overtime allocation procedure was substantially revised. Both

[2] The union notes that the employer's repeated characterization of its proposal as merely a "suggestion" seems deliberately designed to obscure the fact that this was a written contract proposal submitted for inclusion in the collective bargaining agreement but ultimately dropped in negotiations.

arbitrators, in their independent proceedings, concluded that any past practice of a non-monetary remedy developed under the old procedure did not survive under the new procedure. In fact Arbitrator Lundberg agreed with Local 1B that a make-up opportunity remedy was inconsistent with the new procedure and itemized various ways that a make-up remedy would fail to adequately respond to violations of the new procedure. (Award of Lundberg, Appendix page A26, A32.) Arbitrator Lundberg's list of inadequacies in a make-up opportunity remedy for violations of the new procedures are specific factual determinations which the Eighth Circuit simply chose not to consider.

Another problem originates from the Eighth Circuit's failure to recognize the fact that the employer did expressly seek, but failed to obtain, inclusion of a provision calling for no monetary relief for its overtime violations. By failing to acknowledge that the employer had sought specific remedy language in the contract, the Eighth Circuit avoided addressing the implications of such an effort. The very fact that the employer felt compelled to seek such language demonstrates that at negotiations the employer recognized that it could not rely on an alleged past practice developed under the former contractual provision as dictating the appropriate remedy for overtime violations once the overtime allocation procedures were substantially revised.

It is on this point that the case of Aeronca Inc. v. NLRB, 650 F.2d 501 (4th Cir. 1981), is significant. In that case the Fourth Circuit recognized that where a party to a collective bargaining agreement seeks to add express language securing an existing practice into the contract, but ultimately drops that effort, the party cannot subsequently claim that benefit as a past practice. The equitable reasoning behind Aeronca is equally applicable under either labor or arbitration proceedings. A party who seeks to expressly secure a previously unwritten practice into the collective bargaining agreement but either fails or abandons that effort cannot rely on past practice to subsequently claim that benefit. Again, the very fact that a party feels it necessary to seek such language demonstrates that the party questions whether a binding past practice exists.

That principle is even more compelling where the underlying basis for the previous practice has been substantially altered. As noted in Local 1B's earlier submission, arbitrators routinely agree that a past practice does not survive amendment to the underlying contractual language. For example see Thrifty Corp., 85 LA 780, 782-83 (Arb. Gentile 1985); Memphis Light, Gas & Water Div., 69 LA 687, 696 (Arb.. Simon 1977). In the instant case both parties agreed that the existing equalization of overtime opportunities process was not working and agreed to replace it with a strict rotation basis. Yet despite the contractual modification the employer continues to

seek a remedy for violations of the new strict rotation procedure which is consistent with the deleted equalization process but not the new strict rotation concept. As noted by Arbitrator Lundberg:

> Under the prior contract overtime opportunities needed to be equalized. The practice of making up overtime was consistent with the concept of equalizing overtime.
>
> However, making up overtime is not consistent with the new requirement that overtime be offered on a straight rotation.

(Appendix pg. A32.) In the other arbitration proceeding Arbitrator Jacobs also recognized that the make up opportunity remedy sought by the employer was not consistent with the newly negotiated straight rotation process. (Appendix pg. A24-25.)

In the instant case, both arbitrations were conducted separately and independently and neither arbitrator was aware of the other's analysis. Still both arbitrators were aware of the parties' bargaining history. Both arbitrators knew that in former agreements overtime was allocated on an equalization basis. Both arbitrators listened to evidence that under this equalization process overtime violations were, at times, remedied with make-up opportunities. Both arbitrators heard that

the overtime equalization concept was the source of ongoing problems between the parties. Both arbitrators received evidence that the parties mutually sought and agreed upon substantial revisions to the former overtime allocation procedures in the critical negotiations. Both arbitrators recognized that any practice of resolving overtime violations with make up opportunities had occurred under the equalization process. However both arbitrators independently reached the same factual conclusion that the make up remedy sought by the employer for violations of the new policy was inconsistent with the new straight rotation process adopted by the parties.

In so concluding both arbitrators applied the common arbital standard that a past practice does not survive amendment to the underlying contractual language. The arbitrators' application of this standard was particularly appropriate where the undisputed evidence was that the employer had sought the express inclusion of a non-monetary remedy into the contract but abandoned that effort.

In this case the Eighth Circuit ignored the arbitrators' critical determinations concerning the inapplicability of any past practice and the consequences of a substantially revised overtime allocation procedure. In reaching its decision the Eighth Circuit ignored the arbitrators' factual conclusions and based its decision on the erroneous

factual conclusion that the only remedy for overtime violations proposed at negotiations was for monetary compensation and which was rejected by the employer. Even if that was the case, which it was not, the arbitrators' conclusions that a make up opportunity was inconsistent with the new straight rotation procedure was entitled to great deference. The Eighth Circuit's decision so far departs from the standard of deference to arbitration awards as to demand the exercise of this Court's supervisory power. See United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987).

The Employer wrongly asserts that each arbitrator's award failed to draw its essence from the collective bargaining agreement and past practices of the parties. At both arbitrations the evidence showed that whatever the past practice had been as to overtime disputes, the current grievances occurred under a new contract providing for a change in the distribution of overtime. The current contract provides for a distribution of overtime that is based on a straight rotation of opportunity, rather than on the old system which called for equalization in distributing overtime.

In their awards, both arbitrators summarized the arguments of the parties as to the past practice of settling overtime disputes under the old contract

language which provided for equalization of overtime. Both arbitrators noted that the prior practice of making-up overtime under a system designed to equalize the amount of overtime offered to employees did not survive as a "past practice" to remedy a new system of distributing overtime based on a straight rotation of overtime opportunities. Further, both arbitrators noted that a remedy of offering the next available opportunity for overtime as a make-up for a missed opportunity is not consistent with the new language of offering overtime on a straight rotation basis and would inevitably cause a new misapplication of overtime because the next opportunity for overtime would not be offered in rotation order as required by the contract.

CONCLUSION

Local 1B submits that the Court of Appeals decision, which reaches the unprecedented result of vacating two independent arbitration awards, so far departs from the standard of deference to arbitration awards as to demand the exercise of this Court's supervisory power. For the foregoing reasons Local 1B requests that this petition for writ of certiorari be granted.

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